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Vol. VI

TRANSCRIPT OF RECORD

(Pages 2491 to 2964)

Supreme Court of the United States

OCTOBER TERM, 1948

No. 228

NYE & NISSEN (A CORPORATION), AND ABRAHAM MONCHARSH, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

No. 11308

United States

Circuit Court of Appeals

For the Ninth Circuit.

NYE & NISSEN, a Corporation, and ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Ten Volumes

VOLUME VI

Pages 2491 to 2964

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

OSCAR NYSTROM,

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination (Resumed)

Mr. Hippeli: Q. Mr. Nystrom, last evening you had testified that you returned with your truck from the Josiah Royce to the Nye & Nissen plant; you had removed 50 cases of eggs in the presence of Mr. Berman that bore a Department of Agriculture stamp, and 10 cases of eggs that were removed from the Royce, which bore a purple "P" on the label, remained on your truck. Do you recall that? A. Yes, I do.

Q. Was Mr. Berman present at that time?

A. He was.

Q. Did Mr. Berman give you any instructions at that time?

A. He told me to unload them 10 cases also.

Q. What did you do?

Mr. Faulkner: May I have that last answer?

(Answer read.) [2270]

Mr. Hippeli: Q. What did you do then?

A. I unloaded them cases and put them alongside of my truck.

Q. Did you receive any further instructions from Mr. Berman? A. I did.

Q. What did he tell you?

A. He instructed me to see Mr. Goddard about getting 35 more cases to fill an order which he had to go to the Cape Pillar.

(Testimony of Oscar Nystrom.)

Q. What did you do?

A. I seen Mr. Ruby Goddard and he instructed me which cases to take, and I brought them over to the truck, and then Mr. Berman instructed me——

Q. How many cases did you bring over to the truck from Mr. Goddard? A. 35.

Q. Did they bear any stamp?

A. They bore the Department of Agriculture stamp.

Q. Then you brought those over to your truck?

A. That is right.

Q. Who was present at the truck?

A. Mr. Berman.

Q. Did you receive any instructions from Mr. Berman? A. I did.

Q. What did he tell you to do?

A. He told me to proceed to unload the allotment of 45 cases of eggs for the Cape Pillar. And then he told me, "I will show you how to load this truck," he says, "so you won't have any more trouble like we had across the bay." He said, "Put a few of these on and a few of those on." And now, he said, "Put one or two of these on." And after I got finished loading the truck he [2271] gave me the documents and told me to proceed down to pier 34.

Q. When he said, "Put a few of these on," to what was he referring?

A. To the 10 cases.

(Testimony of Oscar Nystrom.)

Q. When he said, "Put another case on," to what was he referring?

A. To the ones with the Department of Agriculture stamp on them.

Q. Were the ten cases of eggs that bore the purple "P" the same ten cases that you had brought back from the Josiah Royce?

A. They were exactly the same ones.

Q. And did Mr. Berman assist you in loading your truck at the time you were to deliver to the Cape Pillar?

A. That is right. He gave me my instructions concerning that.

Q. At that time did Mr. Berman hand you any documents? A. He did.

Q. I will show you U. S. Exhibit No. 57, and ask you to examine that, please. Is that one of the documents that Mr. Berman handed to you on that occasion? A. That is right.

Q. Did you take that document with your load?

A. I took this document and probably four or five more of the identical same document.

Q. To where did you take that document and the load indicated by that document?

A. I took that down to pier 34 at the Lilly-Norton dock.

Q. I will show you U. S. Exhibit No. 45 and ask you if that is similar to the label contained on the ten cases of eggs [2272] that you have testified bore a purple "P" stamp? A. That is right, sir.

Q. I will show you U. S. Exhibit No. 48 and ask

(Testimony of Oscar Nystrom.)

you if that label is similar to the label appearing on the cases which bore the United States Department of Agriculture stamp? A. It does.

Q. After making the delivery, did you return certain delivery documents to the Nye & Nissen plant? A. I did.

Q. To whom did you give them?

A. To Mr. Berman.

Q. Do you recall making a delivery to the steamship Cape Charles? A. I do.

Q. What time did you make that delivery?

A. I made that delivery at the end of the—toward the end of the month of April. I cannot name the exact day, but how I recall it was around that time, it is because I came in contact with the agents.

Q. Did you make a note of the exact time of the delivery to the Cape Charles? A. Yes, I did.

Q. Did you make a note of the exact times of deliveries to other vessels? A. I did.

Q. Have you that note at the present time?

A. No, I have not.

Q. At the time of the delivery to the several vessels, did you advise Agent Johnson or Agent Magee? A. I did.

Mr. Faulkner: We object to that as hearsay as to the defendants, your Honor.

The Court: Read the question. [2273]

(Question read.)

The Court: I will limit it to an answer of "Yes" or "No".

(Testimony of Oscar Nystrom.)

Mr. Hippeli: The question is preliminary, your Honor.

Mr. Faulkner: Exception.

Mr. Hippeli: Q. Did Agents Magee and Johnson show you a list of the dates of deliveries to certain vessels? A. They did.

Mr. Faulkner: Just a moment. What Agents Johnson and Magee did with this witness is hearsay as to the defendants, your Honor.

Mr. Hippeli: I desire to offer to prove——

Mr. Faulkner: It is not binding on them.

Mr. Hippeli: To prove that the agents made a copy of the dates of the deliveries to the several vessels. I will further offer to prove by the witness that he compared that list with the memorandum he had prepared, that he knows that that list is correct; and then I desire to show the witness that list so that he may testify to the exact dates of the deliveries to those several ships.

Mr. Faulkner: A list made by another man, your Honor, is not admissible.

The Court: Read the question.

(Question read.)

Mr. Faulkner: In other words, if he is laying a foundation—— [2274]

The Court: I am prepared to rule. I will sustain the objection at this time.

Mr. Pratt: If the Court please, we would like to present some authorities on this question of the right of the witness to refresh his recollection from

(Testimony of Oscar Nystrom.)

a document which he, himself, did not make, but which was made under his direction.

The Court: That is not before us.

Mr. Pratt: I beg your pardon?

The Court: That is not before us.

Mr. Pratt: Well, I thought it was.

Mr. Hippeli: Q. I will show you a statement signed by Oscar Nystrom dated May 16, 1944, and ask you if you recognize that statement.

A. Yes, I do.

Q. What is it?

A. It is a written testimony that I gave when I was advised to keep a record of the boats that I delivered to down at the War Administration vessels.

Q. Does that list contain the names of certain vessels and the dates of deliveries to certain vessels?

A. They do.

Q. Did you compare that list that you have in your hand with the list that you prepared at the times of the deliveries to those several boats?

A. When I signed this statement I compared it with the notes I had taken at the time of the deliveries to these boats.

Mr. Faulkner: Just a moment. The witness should answer "Yes" or "No" so we can follow this foundation and not volunteer [2275] anything.

The Court: Read the question, Mr. Reporter.

(Question read.)

The Court: You may answer that "Yes" or "No."

A. Yes.

(Testimony of Oscar Nystrom.)

Mr. Hippeli: Q. And are the names of the vessels and the dates of the deliveries to the vessels and the places at which the deliveries were made to the vessels which appear on the list that you have in your hand—does all that information conform to the information that you had on the memorandum which you prepared at the time of the delivery to those several vessels? A. It does.

Mr. Faulkner: Just a moment. That calls for the opinion and conclusions of the witness. In other words, a comparison between a document in court and one that is non-existent and which is the original record.

The Court: I sustain the objection.

Mr. Faulkner: May the answer go out, your Honor?

The Court: It may go out.

Mr. Hippeli: Q. Do you have the list that you prepared in your own handwriting?

A. I have that in my own handwriting.

Q. You have it at the present time?

A. No, I do not.

Q. Do you know where it is?

A. I destroyed it.

Q. Before you destroyed it, did you compare that document with the document that you have in your hand?

A. At the time I left Nye & Nissen and I wrote this, here—— [2276]

Mr. Faulkner: I ask that the witness be directed to answer "Yes" or "No".

(Testimony of Oscar Nystrom.)

The Court: Answer "Yes" or "No".

The Witness: Will you repeat that question, please?

The Court: Read it, Mr. Reporter.

(Question read.)

A. I did.

Mr. Hippeli: Q. And did the two conform?

A. They did.

Mr. Faulkner: The same objection, your Honor. It is the identical question your Honor sustained an objection to a moment ago.

The Court: Develop in what way he compared it. Develop the factual situation.

Mr. Hippeli: Q. How did you compare the two documents?

A. I compared—I was advised——

The Court: Just tell what you did in relation to comparing those two documents.

A. Excuse me, your Honor, but could I explain how I happened to come to make these notes?

The Court: You are limited to your testimony of what you did, yourself, not what anybody else did or said. You just state what you did.

Mr. Hippeli: Q. How did you compare the two documents?

A. I took this—I took the list of the boats on which I had delivered, and I took the list of the boats that they had [2277] inspected, and I compared them with the ones I had, and they were all identical in the same order.

Q. Did the same times appear on both?

(Testimony of Oscar Nystrom.)

A. The dates appear, and the names of the vessel.

Mr. Faulkner: Just a moment. He is now describing a comparison of a paper he made with a paper someone else made. There is no evidence of a comparison with this document.

The Court: Read the question.

(Question read.)

Mr. Faulkner: In other words, the witness just concluded an answer in which he said he took a document that he prepared that had a list of ships on it and compared it with a document that the agents prepared, but he did not compare it with the document in his hand.

The Court: Q. Did you compare it with the document in your hand?

A. I compared my own with this one, here.

Mr. Hippeli: Q. The agents prepared that document, did they not? A. They did.

Q. And you compared the document which the agents prepared that you now have in your hand——

A. Yes.

Q. ——with the document that you had previously prepared in your own handwriting, is that correct? A. That is right.

Q. Does that document that you have in your hand contain your signature?

A. That contains my signature.

Q. At the time you compared them did both of the documents [2278] contain the same ships?

A. They did.

(Testimony of Oscar Nystrom.)

Mr. Faulkner: The same objection, your Honor. It calls for an opinion and conclusion.

The Court: I will allow it. It goes to the weight of the testimony.

Mr. Faulkner: Your Honor just sustained the objection to the same testimony.

The Court: Read the question.

(Question read.)

Mr. Faulkner: I made that objection a moment ago, your Honor, and you sustained it because it calls for his opinion and conclusion. One document is here. One is not. And the basis of the document is whether it is the type to permit him to refresh his recollection.

The Court: The objection will be overruled. Let the question and answer stand.

Mr. Faulkner: Exception.

Mr. Hippeli: Q. At the time you compared the two documents, after the names of the two ships, did they each contain the same dates?

A. That is right.

Mr. Faulkner: Same objection, your Honor. In other words, he is building up a document that is not in existence.

The Court: He has laid the foundation for it in this, that the document that was in existence is no longer in existence. [2279]

Mr. Faulkner: That is right.

The Court: Now he is indicating what he has done with relation to the document he has in his hand.

(Testimony of Oscar Nystrom.)

Your Honor, may I indicate a legal thought to your Honor? In other words, if this was a document which in and of itself would be admissible, and you were trying to lay a foundation of the loss of the original, this examination would be proper. But the law is that you cannot refresh your recollection from a document that has not been prepared by yourself simultaneous with the transaction.

Mr. Pratt: That is not the law.

The Court: I will ask the jury to retire for a few moments.

(The jury retired from the court room.)

Mr. Faulkner: May the witness retire, too?

The Court: You may step out until you are called.

(Thereupon the court and counsel for the respective parties discussed the matter in question, which was reported but is not transcribed.) [2280]

(After recess.)

The Court: You may proceed, gentlemen.

Mr. Hippeli: Q. Where did you prepare the delivery to the Cape Charles?

A. Seventeenth and Missouri Street plant of Nye & Nissen.

Q. Who was present at that time?

A. Mr. Berman.

Q. Did Mr. Berman have any documents with him? A. Yes, he did.

(Testimony of Oscar Nystrom.)

Mr. Faulkner: Did you say "Cape Charles"?

Mr. Hippeli: Yes.

Q. I will show you U. S. Exhibit 94, and ask you to look at that, please. Also look at Government's Exhibit, U. S. Exhibit 93 for Identification.

A. That's right.

Q. Are these Nye & Nissen invoices which you received from Mr. Berman on that occasion?

A. That's right.

Q. Did you deliver these invoices—did you take these invoices with you at the time of the delivery to the Cape Charles? A. I did.

Q. Was the date of delivery the same as the date appearing on the invoices?

A. Approximately.

Q. The invoice calls for 36 cases of eggs, processed, AA; do you recall who directed you to prepare that lot of eggs? A. Yes, I do.

Q. Who? A. Mr. Berman. [2281]

Q. What did he direct you to do?

A. He directed me to see Mr. Goddard about what eggs I was to take on that delivery.

Q. What did Mr. Goddard do?

A. He instructed me the eggs which I was supposed to take.

Q. Did you load 36 cases of eggs on your truck?

A. I did.

Q. Invoice U. S. Exhibit 94 calls for 3 cases of Cheddar cheese weighing 240 pounds; do you recall that cheese? A. Yes.

(Testimony of Oscar Nystrom.)

Q. Who directed what cheese was to be loaded on the truck?

A. Mr. Berman instructed me to see Mr. Goddard and to see if he could have three cases of cheese for that delivery.

Q. Where was the cheese?

A. I believe it was on a tray outside Mr. Goddard's office.

Q. Was the Cheddar cheese inside the plant?

A. The Cheddar cheese was inside the plant.

Q. Who directed you to take that cheese?

A. Mr. Goddard.

Q. The invoice calls for ten boxes of——

Mr. Faulkner: We object to this type of examination. The witness can be asked what he took, and if he can't remember I have no objection to his memory being refreshed, but counsel asks questions from the document, what did he take, where did he get it. If he doesn't know we are entitled to know. Then if he wants to ask about the items—each question is leading and suggestive.

Mr. Hippeli: Q. Do you recall the lot that you delivered to the Cape Charles contained any other products? [2282] A. I don't, no.

Q. I show you U. S. Exhibit 94 and ask if that refreshes your memory. A. Yes, it does.

Q. What does it show on it in addition to Cheddar cheese and eggs? A. 10 boxes of butter.

Q. From whom did you receive the butter?

A. From Mr. Goddard.

Q. Do you recall where you delivered the load?

(Testimony of Oscar Nystrom.)

A. Yes.

Q. Where? A. Pier 18, San Francisco.

Q. At the time of the delivery did you get certain documents signed? A. I did.

Q. To whom did you return those documents?

A. Mr. Berman.

Q. Do you recall delivering a load to the steamship Henry White? A. I do.

Q. When did you make that delivery?

A. I can't state the exact date, but I would say the first days of May.

Q. The first part of May?

A. The first part of May.

Q. From where did you make the delivery?

A. Nye & Nissen plant, Seventeenth and Missouri

Q. At the time you were preparing your load do you recall who was present?

A. Yes, I do.

Q. Who? A. Mr. Berman.

Q. Did Mr. Berman hand you any documents?

A. He did.

Q. I will show you Exhibit 53 and ask you if that is one of the documents which you received from Mr. Berman at that time?

A. Yes, that is. [2283]

Q. Did you deliver that document down at the dock, do you know, with the load? A. I did.

Q. Do you recall to what dock that delivery was made? A. Yes, I do.

(Testimony of Oscar Nystrom.)

Q. Can you recall that without looking at the invoice? A. I can.

Q. Where was it?

A. Howard Terminal, Oakland.

Q. Will you look at the invoice and see if you are right?

Mr. Faulkner: I object to that type of examination.

Mr. Hippeli: I don't know whether it was. I wanted to check his testimony.

Mr. Faulkner: That is what I observed.

Mr. Hippeli: Q. Do you recall what comprised that load? A. I don't remember exactly.

Q. Do you know if there was any butter in the load? A. I don't remember.

Q. Do you know if there were any eggs in the load? A. There were eggs, yes.

Q. Who pointed out the eggs that you were to take? A. Mr. Berman.

Q. Do you know if there was any cheese in the load?

A. There should be some cheese there.

Q. Do you recall what kind of cheese?

A. No, I do not.

Q. Directing your attention to U. S. Exhibit 53, I will ask if that refreshes your recollection as to whether or not there is any butter, and as to the particular kinds of cheese delivered? A. Yes.

Q. From whom did you receive the butter?

A. I received the butter from Mr. Goddard.

Q. From whom did you receive the cheese?

(Testimony of Oscar Nystrom.)

A. Mr. Berman.

Q. Did you deliver the load indicated by U. S. Exhibit 53 and the accompanying documents to the Howard Terminal at Oakland?

A. That's right.

Q. Did you get certain documents signed there?

A. Yes.

Q. Did you return them to the Nye & Nissen plant? A. I did.

Q. To whom did you give them?

A. Mr. Berman.

Q. Do you recall making a delivery of a load to the steamship Gilbert Hitchcock?

A. Yes, I do.

Q. Do you recall the time you made that delivery? A. In the first part of May.

Q. What year? A. 1944.

Q. From where was the delivery made?

A. From the Nye & Nissen plant, Seventeenth and Missouri Streets.

Q. Do you recall to where the delivery was made? A. No, I do not.

Q. What was delivered at that time?

A. I don't remember the exact articles.

Q. Do you know whether you delivered any eggs?

A. I always delivered eggs on my deliveries.

Q. From whom would you receive your eggs at the time of this delivery?

A. From Mr. Berman and Mr. Goddard.

Q. Do you recall delivering any cheese?

A. No, I do not. [2285]

(Testimony of Oscar Nystrom.)

Q. Any butter? A. I don't.

Q. At the time the load was being made up did you receive any documents from Mr. Berman?

A. I did.

Q. I will show you U. S. Exhibit 144 and ask you if you received that document from Mr. Berman? A. Yes, I did.

Q. Did you deliver that document with the load?

A. I did.

Q. To where was that delivery made?

A. Pier 23.

Q. Did that delivery include any butter.

A. Yes, it did.

Q. From whom did you receive the butter?

A. Mr. Goddard.

Mr. Faulkner: Just a moment. The witness has testified that he does not remember whether there was any butter on this load or not. There is nothing on this document that would refresh his recollection as to where he got the butter and on three occasions now he has testified that he does not remember whether there was butter and he proceeds to testify that Mr. Goddard gave him the butter after he has testified that he does not remember delivering it and there is nothing on these documents that could refresh his recollection in that respect. I object to that type of examination after a witness has testified that he does not remember whether the butter was involved and then testifying that he remembers who gave it to him.

Mr. Hippeli: The document refreshes his recol-

(Testimony of Oscar Nystrom.)

lection to the extent that he knows that he got butter. I then asked him if he knew from whom he received it and he told me he did— [2286] he did know from whom he received it. If Mr. Faulkner wants to find out how he knows from whom he received it he is free to do that on cross examination, but that is his testimony.

Mr. Faulkner: I submit, your Honor, when an answer is given a man does not remember that they are not permitted to cross examine their own witness.

The Court: Read the question and the answer.

(The record was read.)

Mr. Faulkner: I submit that is cross examination of their own witness, because Mr. Nystrom has already testified he had no recollection of any butter being involved in this transaction.

The Court: Have you any independent recollection of butter that they speak about, yourself?

Have you any independent recollection of it yourself?

The Witness: No, I have not.

Mr. Hippeli: Q. Is your recollection restored when you look at the invoice accompanying your delivery? A. Yes, it is.

The Court: What does the invoice show with relation to butter?

Mr. Hippeli: 25 boxes of butter Grade AA.

Q. Having restored your recollection from the invoice for the delivery to the Gilbert Hitchcock,

(Testimony of Oscar Nystrom.)

U. S. Exhibit 144, I ask you do you recall from whom you received that butter? [2287]

Mr. Faulkner: Just a minute.

The Witness: A. Mr. Goddard.

Mr. Faulkner: The witness already testified he has no recollection of the butter in relation to the Gilbert Hitchcock. He looked at the document——

The Court: You may develop that on cross examination. Let the question and the answer stand.

Mr. Faulkner: Exception.

Mr. Hippeli: Q. Independently of the invoice, do you recall having delivered any Cheddar cheese?

A. Yes, I do.

Q. From whom did you receive the Cheddar cheese? A. Mr. Goddard.

Q. Independently of the invoice, do you remember whether you delivered any other type of cheese?

A. No, I do not recall. I think there was some American processed cheese.

Q. I direct your attention to the invoice, U. S. Exhibit No. 144, and ask you if it includes any cheese other than Cheddar? A. It does.

Q. From whom did you receive that other type of cheese? A. Mr. Berman.

Q. You delivered the load indicated by U. S. Exhibit 144 and the accompanying document to Pier 23, did you? A. That's right.

Q. That load included eggs?

A. That's right.

Q. Directing your attention to the invoice, I

(Testimony of Oscar Nystrom.)

will ask you if you recall whether any of those cases of eggs bore a label? [2288]

A. Yes, they all bore labels.

Q. Was that the Nye & Nissen green biddy egg label? A. That's right.

Q. Was that a label similar to U. S. Exhibit 47?

A. Yes.

Mr. Faulkner: What was the number of that exhibit?

Mr. Hippeli: 47.

Q. At the time of the delivery were certain of your delivery documents signed at the dock?

A. They were.

Q. What was done with those documents?

A. They were brought back to 17th and Missouri Streets, to Nye & Nissen plant.

Q. To whom were they given?

A. Mr. Berman.

Q. Do you recall making a delivery to the steamship Czechoslovakia Victory? A. I do.

Q. What was the time of this delivery?

A. First part of May.

Q. What year? A. 1944.

Q. From where was the delivery made?

A. From the Nye & Nissen plant, 17th and Missouri Streets.

Q. Who was present at the time the load was made? A. Mr. Berman.

Q. Do you recall what that load consisted of?

A. Yes, I do.

Q. What was it? A. Eggs.

(Testimony of Oscar Nystrom.)

Q. Do you know whether it included anything else?

A. I have no recollection on remembering that.

Q. Do you know to where the delivery was made?

A. It was made over to the East Bay. [2289]

Q. At the time the load was being prepared did you receive any documents? A. I did.

Q. From whom? A. Mr. Berman.

Q. Do you recall who indicated the lot of eggs that was to be delivered? A. Yes, I do.

Q. Who was that? A. Mr. Berman.

Q. I will show you U. S. Exhibit 151 and ask you if that is a Nye & Nissen invoice received from Mr. Berman at that time? A. That's right.

Q. At the time of that delivery did you take documents similar to U. S. Exhibit 151 with the load? A. I did.

Q. Were certain of these documents taken to the Czechoslovakia Victory? A. They were.

Q. Were certain of those documents signed by the ship? A. They were.

Q. What was done with them thereafter?

A. I proceeded back to the plant and turned them over to Mr. Berman.

Q. Do you recall whether the cases of eggs bore any label? A. Yes, I do.

Q. What type of label was that?

A. Biddy egg label.

Q. Was it the green Nye & Nissen label?

A. That's right.